(1)

Supreme Court, U.S.
FILED

No. 05-1415 MAY 4 - 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM E. WASHINGTON,

Petitioner,

vs.

SUPERINTENDENT JAMES GRACE and OFFICE OF THE DISTRICT ATTORNEY OF DELAWARE COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE THIRD CIRCUIT COURT OF APPEALS ERR BY NOT GRANTING A CERTIFICATE OF APPEALABILITY WITH REFERENCE TO THE HABEAS CORPUS PETITION OF APPELLANT?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

William E. Washington, an individual;
Superintendent James Grace, an individual;
Office Of The District Attorney Of Delaware County

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CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

William E. Washington v. Superintendent James Grace, et al, 05-4378 (3rd Cir. February 3, 2006 and December 7, 2005). App. 22 and App. 21.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Third Circuit entered its final judgment on February 3, 2006 denying petitioner's request for rehearing en banc. On December 7, 2005, the Third Circuit Court of Appeals denied petitioner's request for certificate of appealability. Petitioner William E. Washington seeks review of these judgments on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review, on a writ of certiorari, the final order of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment IV, Unreasonable Search and Seizure Clause, and Amendment VI, Confrontation Clause.

STATEMENT OF THE CASE

This Petition is occasioned by the denial of Appellant's Request for a Certificate of Appealability in an Order issued on February 3, 2006 by the Third Circuit Court of Appeals denying a petition for rehearing en banc and signed by the Honorable Maryanne Trump Barry, Circuit Judge. A true and correct copy of this Order and Opinion is attached and incorporated at Appendix A-22.

Undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the decision in the instant case is contrary to decisions of the United States Court of Appeals for the Third Circuit and/or the Supreme Court of the United States, and that the decision by the Court of Appeals is contrary to the decision of this Court or the Supreme Court in the case of *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) and *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), dealing with the Confrontation Clause, as well as *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), dealing with the "fruit of the poisonous tree," arising out of an illegal search.

Undersigned counsel further expresses a belief that this appeal involves questions of exceptional importance regarding a defendant's right to confront witnesses on cross-examination under the Sixth Amendment to the United States Constitution, as well as the right of defendant to challenge an unsigned and invalid search warrant under the Fourth Amendment, which taints the subsequent prosecution.

Petitioner is William E. Washington, who is currently incarcerated at the State Correctional Institution ir

Huntingdon, PA. Respondent James Grace is the Superintendent for the State Correctional Institution at Huntingdon, PA, with the address as indicated in the caption. The District Attorney's Office of Delaware County was added as a party by the District Court.

The Petitioner was tried before the Honorable Joseph P. Cronin, Jr., of the Court of Common Pleas of Delaware County, in three separate jury verdicts commencing on 5/1/02 (two consolidated incidents), 5/2/02 and 5/29/02. Mr. Washington was charged arising out of four separate criminal incidents, which occurred in Yeadon, PA between 5/30/01 and 8/4/01, and he was convicted of robbery, criminal restraint, terroristic threat and related offenses. On 6/26/02, Judge Cronin sentenced Mr. Washington to the following: an aggregate term of confinement of not less than nine (9) months, nor more than eighteen (18) months on No. 4373-01 for Criminal Attempt and Unlawful Restraint; an aggregate term of confinement of not less than nine (9) months, nor more than eighteen (18) months on No. 4376-01 for Terroristic Threats; an aggregate term of confinement of not less than fifty-four (54) months, nor more than one hundred eight (108) months on No. 4145-01 for Robbery and Robbery of a Motor Vehicle.

Petitioner appealed to the Superior Court of Pennsylvania, which denied his consolidated appeals on 1/14/04 from the three-jury verdicts. Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on 7/13/04. Petitioner filed a Petition for a Writ of Habeas Corpus before the United States District Court for the Eastern District of Pennsylvania. The Honorable Curtis Joyner in an Order of 8/23/05 denied the Petition for Habeas Corpus and adopted the Report and Recommendation of Magistrate Judge Sandra Moore

Wells, which is attached and incorporated at Appendix A-7.

In the Petition for Habeas Corpus, Mr. Washington alleged that his constitutional rights have been violated for the following reasons:

(a) he has been incarcerated without due process and in violation of the Constitution of the United States, since the trial Court did not allow defense counsel to play a tape recording between Mr. Washington, the complainant and his father, which was exculpatory;

(b) he was incarcerated without due process and in violation of the Constitution of the United States, because the arrest and search warrants executed against Mr. Washington were invalid, since they were not signed by the issuing authority and there was no expiration date;

(c) the trial Court allowed the amendment of criminal charges one day before the trial, and different charges were alleged.

Mr. Washington appealed to the Court of Appeals for the Third Circuit, requesting a Certificate of Appealability. Such request was denied by the Court by Order of December 7, 2005. A Petition for Rehearing en banc was filed and denied by the Third Circuit Court of Appeals on February 3, 2006. Appellant then timely filed this Petition for Writ of Certiorari.

ARGUMENT FOR APPELLANT

A. WHETHER THE THIRD CIRCUIT COURT OF APPEALS ERRED BY NOT GRANTING A CERTIFICATE OF APPEALABILITY WITH REFERENCE TO THE DENIAL OF A PETITION FOR WRIT OF HABEAS CORPUS BY THE DISTRICT COURT.

1. Standard Of Review

Pursuant to AEDPA, a federal habeas court may overturn state court's resolution of the merits of a constitutional issue only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Hackett v. Price,* 381 F.3d 281, 286 (3d Cir. 2004).

Under the "unreasonable application" clause, a federal court may grant the writ if the state court identifies the correct governing legal principle from Supreme Court decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The appropriate inquiry, under the "unreasonable application of" standard, is "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. An unreasonable application of federal law involves more than merely an incorrect or erroneous application of federal law: "[A] federal habeas court may not grant relief unless that court

determines that a states court's incorrect application of clearly established federal law was also unreasonable." *Id.* (citing *Williams,* 529 U.S. at 411).

Several principles guide the determination of whether a Certificate of Appealability should issue. First, the petitioner need not demonstrate that he will (or even is likely to) prevail on appeal for a Certificate of Appealability to issue. As the Supreme Court has put it, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983) (citation omitted). Rather, the standard is whether the District Court's procedural ruling is debatable among jurists of reason, and whether at least one constitutional claim is substantial, meaning that resolution of the merits could be debated among jurists of reason. *Slack v. McDaniel,* 529 U.S. at 484-85; *see also* 28 U.S.C. §2253(c)(2); *Barefoot v. Estelle*, 463 U.S. at 893 n.4. Second, any doubt as to the satisfaction of the COA standard should be resolved in favor of hearing the appeal. See *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000); *Buxton v. Collins,* 925 F.2d 816, 819 (5th Cir., cert. denied, 498 U.S. 1128 (1991)).

Finally, when a District Court dismisses a petition on procedural grounds without assessing the merits of the constitutional claims, courts of appeals should resolve the debatability of the procedural ruling before assessing the substantiality of the constitutional claims. *Slack v. McDaniel*, 529 U.S. at 485. This is consistent with the long-standing "avoidance doctrine," whereby courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," *Id.*

(quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). If a District Court's procedural ruling is deemed debatable, the appeals court may in its discretion remand the case for a determination of whether the constitutional claims are substantial. See *Slack v. McDaniel*, 529 U.S. at 485 (remanding for lower court determination of whether constitutional claims substantial); *United States v. Williams*, 158 F.3d 736, 742 n.4 (3d Cir. 1998) (expressing preference for initial District Court review and noting remand may be appropriate when District Court has not passed on issue).

2. Constitutional Error Was Committed By Prohibiting Defendant From Introducing A Tape Recording Of The Victim, Which Was Exculpatory Evidence, In Violation Of Defendant's Right Of Confrontation

Evan Tolson, the alleged victim, testified that on 5/30/01, he encountered Mr. Washington on the streets of Yeadon, PA. When Tolson stopped his car for a stop sign, the defendant got into the car and asked Tolson to drive him to a nearby store. Tolson declined since he was on his way to the Firehouse to watch a basketball game on television. After driving approximately 5 blocks with the defendant in his car, Tolson arrived at the Firehouse. The defendant repeated his request that Tolson drive him to the store. When Tolson turned off the ignition of the car, the defendant snatched the keys from Tolson and refused to return them to Tolson.

The defendant got into the driver's seat of the car, started the engine and began to drive away. As the defendant began to drive away, he asked Tolson to get into the

car. Tolson refused and the defendant drove away with Tolson's mother's car. The next day, Tolson saw his mother's car parked on the street in front of the defendant's girlfriend's house. The police recovered the car and the defendant was arrested on June 4, 2001 and charged with Robbery and Unauthorized Use of an Automobile.

During the cross-examination of Tolson, defense counsel asked him about making a tape recording for the defendant and the defendant's father, shortly after the defendant was arrested on the charges mentioned above. Tolson denied any recollection of such a conversation.

The next day the Commonwealth was allowed to recall Tolson to the witness stand over the objection of the defendant. The Commonwealth was then permitted to question Tolson about the incident involving the tape-recorded statement. Tolson remembered giving the defendant a tape-recorded statement, which was allegedly coerced by the defendant and/or the defendant's father.

During the defense case, defendant's counsel offered to introduce the tape recording made of the defendant's conversation with Tolson a short time after defendant was arrested. The trial court refused to allow the defendant to play the tape recording after reviewing it outside of the hearing of the jury.

A defendant has a fundamental right to present evidence in his defense, provided it is relevant and not subject to exclusion under an established evidentiary rule. *Commonwealth v. McGowan*, 535 Pa. 292, 294, 635 A.2d 113, 115 (1993); *Commonwealth v. Thompson*, 779 A.2d 1195 (Pa. Super. 2001); *Commonwealth v. Scott*, 480 Pa. 50, 389 A.2d 79 (1978). Evidence which tends to show that

the crime for which an accused stands trial was committed by someone else is both relevant and admissible. *Commonwealth v. Ward*, 529 Pa. 506, 605 A.2d 796 (1992). Likewise, evidence, which tends to show that no crime was committed by anyone, is relevant and admissible. In every criminal trial, there must be proof of the corpus delicti, i.e., the occurrence of a loss or injury and some person's criminal conduct as the source of that loss or injury. *Commonwealth v. Zugay*, 745 A.2d 639 (Pa. Super. 2000).

The defendant sought to introduce a tape recording of a conversation between the victim, the defendant and the defendant's father which took place shortly after the defendant was arrested. The defense asserted that the tape recording would show that no crime had been committed. The trial judge reviewed the tape recording after receiving assurance it was made with the knowledge and consent of the victim. The trial court precluded the introduction of the tape recording because the defendant's father testified about the conversation and the victim acknowledged that a conversation between himself and the defendant had been recorded.

The jury never heard the victim's own words suggesting that no crime had occurred when the defendant took the victim's car to go to the store. This would have been powerful evidence impeaching the alleged victim's credibility. The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

A primary goal of the right to confront witnesses is to secure the defendant's opportunity for cross-examination.

See *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The right to confront witnesses also prohibits unreasonable limitation of the scope of cross-examination. The leading case on this matter is *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), in which the U.S. Supreme Court held that a state prohibition on revealing a juvenile's record denied the defendant his right to confront witnesses. Under United States Supreme Court precedent, as well as Pennsylvania law, petitioner was denied the right to confront his accuser on cross-examination.

Without listening to the tape recording at an evidentiary hearing, the crucial nature of the tape recording cannot be assessed from the jury's perspective. To deprive Mr. Washington of the ability to confront his accuser with his own words violates his Constitutional Right of Confrontation. The literal right to confront the witness at the time of trial forms the core of the values furthered by the Confrontation Clause. *California v. Green*, 399 U.S. 149, 157 (1970); *United States v. Abel*, 469 U.S. 45, 50 (1984). An evidentiary hearing in which the tape could be played would underscore that the tape was necessary for effective cross-examination of the witness.

3. The Search Warrant Executed Against Appellant Was Invalid, Since It Was Not Signed By The Issuing Authority And There Was No Expiration Date

On August 12, 2001 at approximately 6:00 P.M., officers of the Yeadon Police Department forcibly and illegally entered the home of defendant, William Echelon Washington and his parents, to serve a search warrant.

The signature of the issuing authority on the warrant is illegible and markedly disparate from similar signatures on other documents. A true and correct copy of the warrant is attached and incorporated at Appendix A-24. There was no evidence that the warrant was properly issued and signed by the appropriate judicial officer. It is axiomatic that an invalid warrant is a nullity and taints the entire criminal process.

It appears that the search warrant, that was initially issued against Mr. Washington by Delaware County District Justice Tolliver, was never signed by him. Of course, it is standard procedure that an issuing magistrate will sign and seal all of those complaints, citations, summons, or warrants for which he or she is responsible for initiating.

To be valid, a warrant must be properly dated and signed by a judicial officer. *Commonwealth v. Chandler*, 477 A.2d 851 (Pa. 1984). By failing to have a validly signed warrant, the police tainted the proceedings against defendant. See *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Where there is such a taint, this is an exception to the rule that an illegal arrest or detention does not void a subsequent conviction.

CONCLUSION

Review of the Court of Appeals decision through a writ of certiorari will yield a result that is required under the United States Constitution on the issues of the right of confrontation and the right to be free from illegal search and seizure. This result conforms to the teachings of the

Supreme Court. For all the foregoing reasons, it is respectfully submitted that the Third Circuit Court of Appeals erred by not granting a certificate of appealability with reference to the Habeas Corpus Petition of appellant.

Respectfully submitted,

JOHN J. O'BRIEN, JR., ESQUIRE
(*Counsel of Record*)
WILLIAM C. REIL, ESQUIRE

Attorneys for Petitioner
William E. Washington

May 1, 2006

CPS-43 November 10, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **054378**

WILLIAM E. WASHINGTON

VS.

JAMES GRACE, ET AL.

(ED. PA. CIV. NO. 04-CV-04812)

Present: BARRY, SMITH AND NYGAARD, *CIRCUIT JUDGES*

Submitted appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

in the above-captioned case.

Respectfully,

Clerk

MMW/KEK/zm/cmd

ORDER

The foregoing request for a certificate of appealability is denied. We disagree with the District Court that the state court's refusal to consider Washington's illegal arrest and search claim was a denial based upon independent and adequate state grounds, effectively barring federal review. *See Ford v. Georgia,* 498 U.S. 411, 423-24 (1979); *Faherty v. Gracias,* 874 A.2d 1239, 1245 (Pa. Super. 2005); *Commonwealth v. Dupre,* 866 A.2d 1089, 1096-97 (Pa. Super. 2002); *Commonwealth v. Lutes,* 793 A.2d 949, 955 n.1 (Pa. Super. 2002). We conclude, however, that the Appellant has not made a substantial showing of the denial of a

constitutional right with regard to this claim. *See Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (illegal arrest or detention does not void a subsequent conviction). We also conclude, for substantially the reasons given by the District Court in denying his petition, that he has not made such a showing with regard to his remaining claims. *See* 28 U.S.C. § 2253(c)(2).

By the Court,

/s/ Maryanne Trump Barry
Circuit Judge

Dated: December 7, 2005
CME cc: William C. Reil, Esq.
Louis G. Stesis, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM E. WASHINGTON,	:	CIVIL ACTION
vs.	:	
SUPERINTENDENT JAMES GRACE, et al.	:	NO. 04-CV-4812

ORDER

(Filed Aug. 25, 2005)

AND NOW, this 23rd day of August, 2005, after consideration of the Report and Recommendation of Carol Sandra Moore Wells, United States Magistrate Judge and the objections of Petitioner, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for writ of habeas corpus is DENIED, without a hearing, as Petitioner has not shown that any reasonable jurist could find it debatable that this petition is procedurally barred or that Petitioner has shown a denial of a constitutional right; and

3. There is no probable cause for appeal.

BY THE COURT:

/s/ J. Curtis Joyner
J. CURTIS JOYNER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM WASHINGTON,	:	CIVIL ACTION
Petitioner	:	NO. 04-4812
v.	:	
SUPERINTENDENT JAMES GRACE, et al.,	:	
Respondent	:	

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS July 29, 2005
UNITED STATES MAGISTRATE JUDGE

Presently before this court is a petition for habeas corpus relief filed pursuant to 28 U.S.C. § 2254. Petitioner, William E. Washington ("Petitioner"), an inmate at the State Correctional Institute at Huntingdon, Pennsylvania, alleges that unconstitutional errors were committed by the trial court. The Honorable J. Curtis Joyner referred this matter to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) for the reasons stated below, it is recommended that Petitioner's claims be DENIED.

I. BACKGROUND AND PROCEDURAL HISTORY[1]

Petitioner was charged with robbery and various offenses which occurred in Yeadon, Delaware County on

[1] The background and procedural history were drawn from Petitioner's habeas petition, brief and attachments, the Government's response, with exhibits, and the state court record.

May 31, 2001 and August 4, 2001. *Commonwealth v. Washington.* Nos. 4373-01, 4376-01, and 4145-01 EDA 2002 at 1-2 (Dec. 26, 2002). According to the trial court:

> At trial, the Commonwealth called as a witness, Donald Richley. Mr. Richley testified that on August 4, 2001, [Petitioner] went to the Tri-Star Market, in Yeadon, Pennsylvania, to purchase a pack of cigarettes. Mr. Richley testified that as he exited the Tri-Star Market, [Petitioner] followed him and as Mr. Richley was getting into his automobile, [Petitioner] instructed him to "get in the car." Further, he testified that [Petitioner] pushed him to get him into the automobile. At that point, Mr. Richley "spun around" and went back into the store. Once he was in the store, he called the police.
>
> At trial, the Commonwealth called as a witness, Michael Scott Jr. Mr. Scott testified that on July 28, 2001, he was leaving the Tri-Star Market, cutting across the parking lot towards Bullock Avenue, when [Petitioner] approached him said "hey you, come here." At that point, Mr. Scott began running out of fear. Then, [Petitioner] shouted at him "If you don't stop, I'm going to shoot you."

Commonwealth v. Washington, Nos. 4373-01, 4376-01, and 4145-01 EDA 2002 at 1-2, 5-7 (Del. County Ct. Comm. Pl., Dec. 26, 2002) (*citations to the record omitted*). Specific facts supporting Petitioner's arrest and conviction for Robbery and Robbery of a Motor Vehicle follow. The victim, Evan Tolson, familiar with Petitioner a neighborhood acquaintance, testified that he encountered Petitioner on the streets of Yeadon on May 30, 2001. N.T., 05/29/02 at

175. Petitioner approached and entered Tolson's stopped car, asking him for a ride; Tolson denied the request, as he was en route to the Yeadon Fire Department. *Id.* at 175, 178-79. Petitioner remained in Tolson's car until they arrived at the firehouse. *Id.* at 180. There, Petitioner repeated his request for a ride, took the car keys from Tolson when he refused, and drove away. *Id.* at 180-81. That evening, Tolson reported that his car had been stolen and notified police that he had seen his Blue Chevy Malibu parked outside the home of Petitioner's girlfriend. *Id.* at 180-81, 198.

Petitioner was convicted of Criminal Attempt to Commit Unlawful Restraint (No. 4373-01), Terroristic Threats (No. 4376-01) and Robbery of a Motor Vehicle (No. 4145-01) at the close of two jury trials.[2] *Id.* On June 26, 2002, the Honorable Joseph P. Cronin, Jr., in the Court of Common Pleas of Delaware County, Pennsylvania, sentenced Petitioner to an aggregate term of confinement of

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[2] By order dated March 27, 2002, Case No. 4373-01 was consolidated with Case No. 4376-01 for trial. *See Commonwealth v. Washington*, Nos. 4373-01, 4376-01, and 4145-01 EDA 2002 at 1 (Dec. 26, 2002). These cases were then tried before jury on May 1, 2002 and May 2, 2002. Separate trials were ordered for Case Nos. 4376-01 and 4145-01. *Id.*

> On [No. 4373-01], [Petitioner] Washington was convicted of Criminal Attempt and Unlawful Restraint and was sentenced to serve an aggregate term of confinement of not less than nine (9) months, nor more than eighteen (18) months. On [No. 4376-01], Petitioner was convicted of Robbery and Robbery of a Motor Vehicle and was sentenced to serve an aggregate term of confinement of not less than fifty-four months nor more than one hundred eight months.

Commonwealth v. Washington, Nos. 4373-01, 4376-01, and 4145-01 at 1-2 (Del. County Ct. Comm. Pl., Dec. 26, 2002) (*citations to the record omitted*).

72-144 months, of which 54-108 months resulted from the conviction for Robbery and Robbery of a Motor Vehicle. *Commonwealth v. Washington*, Nos. 4376-01, 4145-01, 4373-01 at 1-2 (Del. County Ct. Com. Pl., Dec. 26, 2002).[3]

On July 5, 2002, Petitioner filed Post-Sentence Motions and, on July 18, 2002, he appealed his sentence to the Superior Court. Since these two procedures can not [sic] be employed simultaneously, the trial court deemed Petitioner's Notice of Appeal a withdrawal of his Post-Sentence Motions and, consequently denied them. *Id.* at 2. The Pennsylvania Superior Court affirmed the judgment for reasons expressed in the trial court opinion.[4]

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[3] Also, Petitioner was sentenced to 9-18 months for Criminal Attempt and Unlawful Restraint and 9-18 months for Terroristic Threats. *Id.*

[4] On direct appeal, Petitioner asserted that:

I. The trial court committed reversible error when it allowed the Commonwealth to file an information charging "Robbery of a Motor Vehicle" on the day before the [Petitioner's] trial;

II. The trial court committed reversible error when it allowed the Commonwealth to recall Evan Tolson to the stand on redirect examination to rehabilitate him prior to the presentation of evidence against him by the [Petitioner];

III. The trial court committed reversible error when it denied the [Petitioner] the opportunity to present impeachment evidence of Evan Tolson in the form of a consensual tape recording of a conversation between Evan Tolson, the [Petitioner] and [Petitioner's] father;

IV. The verdict of guilty of criminal attempt to commit unlawful restraint of Donald Richley was contrary to law, because the Commonwealth did not meet its burden of proof in establishing the elements of those crimes; and

V. The criminal complaints and arrest warrants in this case were defective because they were issued by District Justice Tolliver but allegedly signed by another district justice.

Commonwealth v. Washington,

Commonwealth v. Washington, Nos. 2612, 2613 & 2614 EDA 2002 at 4 (Pa. Super. Ct., Jan. 14, 2004).

Next, on November 12, 2004, Petitioner filed the instant petition for writ of habeas corpus asserting three claims:

> Ground One – Trial court committed error by prohibiting Petitioner from introducing exculpatory evidence in the form of a tape-recording of a conversation between the complaining witness, Petitioner and Petitioner's father;
>
> Ground Two – The trial court erred by allowing the Commonwealth to add a criminal information charging the Petitioner with robbery of a motor vehicle on the day before the trial; and
>
> Ground Three – Petitioner was incarcerated as a result of an unlawful and unconstitutional arrest and search.

Petition for Writ of Habeas Corpus ("Pet.") at 9-10; *Petitioner's Memorandum of Law in Support of the Petition* ("Pet. Br.") at 2, 5.

II. DISCUSSION

A. Exhaustion Requirement

A petition for habeas corpus is a final effort to obtain relief when other legal remedies are foreclosed. A district court may consider and grant habeas corpus relief only if Petitioner meets his burden of proving that he has either exhausted all state remedies available to him with respect to each discrete allegation, there is an absence of available State corrective process, or circumstances exist that render such process ineffective to protect the rights of the

applicant. 28 U.S.C. § 2254(b).[5] To exhaust habeas claims, a state prisoner must "fairly present" all federal claims to the highest state court. *See* 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel,* 526 U.S. 838, 842 (1999); *see also Picard v. Connor,* 404 U.S. 270, 275 (1971) (holding that State courts should have an opportunity to pass upon and correct alleged errors). Petitioner has presented his claims to the trial court and to the Pennsylvania Superior Court on direct appeal, thereby satisfying the exhaustion requirement.

B. Procedural Bar – *Ground Three – Unconstitutional Search and Seizure Claim*

Petitioner contends that he is incarcerated as the result of an unlawful search and seizure, because the arrest and search warrants, while issued by one judge, were signed by another judicial officer, without mention of an expiration date. Pet. at 9-10. The Government responded that, inasmuch as the alleged defect was neither

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[5] The exhaustion requirements of 28 U.S.C. § 2254 provide:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant . . .

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedures, the question presented.

timely raised before the conclusion of the preliminary hearing nor prejudicial to Petitioner's rights,[6] habeas relief is inappropriate. *Commonwealth's Answer to Application for Habeas Corpus Relief* ("Ans.") at 13.

The Pennsylvania Superior Court refused to address the merits of this claim, because Petitioner did not adhere to local procedural rules in presenting it. *Commonwealth v. Washington*, Nos. 2612, 2613 & 2614 EDA 2002 at 3-4 (Pa. Super. Ct., Jan. 14, 2004). Specifically, Petitioner's Statement of Questions Involved on direct appeal surpassed the one page maximum set by Pa.R.A.P. 2116 (2002); his fifth question, addressing his arrest and search warrants, appeared on the second page. Based on Pennsylvania Appellate Rule 2116(a), this statement "*must never exceed one page, and must always be on a separate page,* without any other matter appearing thereon. *This rule is to be considered in the highest degree mandatory, admitting of no exception.*" *Commonwealth v. Washington*, Nos. 2612, 2613 & 2614 EDA at 3-4 (*emphasis in original*). The Superior Court adhering to Pa. R. A.P. 2116(a), refused to review Petitioner's fifth issue, because it was on the forbidden second page. *Id.* at 4. The state court's denial of this claim, based on independent and adequate state

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[6] Under Rule 109 of Pennsylvania Rules of Criminal Procedure, "A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, commons, or warrant, or a defect in the procedures of these rule [sic], unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant." Pa.R.Crim.P. 109 (2005).

grounds, is barred from federal habeas review. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

A federal habeas court will not review a question of federal law decided by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the determination. *Coleman*, 501 U.S. at 729 (1991); *Villot v. Varner*, 373 F.3d 327 (3d Cir. 2004); 28 U.S.C. §2254(b)(1)(A). A state procedural rule provides an independent and adequate basis for precluding federal habeas review of a state prisoner's claims only if: 1) the state procedural rule speaks in unmistakable terms; 2) all state appellate courts refused to review petitioner's claims on the merits; 3) the state court's refusal of review is consistent with other decisions; and 4) the state rule is consistently and regularly applied. *Szuchon v. Lehmon*, 273 F.3d 299, 325-26 (3d Cir. 2001) (*quoting Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996)). If the state court reached the merit of a claim as an alternative holding, the claim is nevertheless defaulted. *See Sistrunk v. Vaughn*, 96 F.3d 666, 673 (3d Cir. 1996) (*citing Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989)).

Pennsylvania Appellate Rules are independent of any federal question. Pennsylvania appellate courts consistently and strictly enforce their Rules of Appellate Procedure. *See, e.g., Commonwealth v. McCafferty*, 563 A.2d 1155, 1164 (Pa. 2000) (holding that an issue is waived when not properly presented in Statement of Questions Involved); *Commonwealth v. Higgins*, 809 A.2d 908, 912 (Pa. Super. Ct. 2002) (same). Pennsylvania Rules of Appellate Procedure, Rule 2116 is clear on its face. The state intermediate court's refusal to review this claim on the merits, consistent with both the rule and relevant case law, bars this court's review, unless excusable.

Petitioner was represented by counsel at the time of default; counsel acts for his client and is assumed to be familiar with applicable appellate rules. Furthermore, Petitioner has neither alleged nor shown that execution of the underlying search and arrest warrants by two distinct judges, without a stated deadline for execution thereof, deprived him of a fair trial, prejudiced him, or resulted in the conviction of an innocent man. *See Murray v. Carrier*, 477 U.S. 478, 496 (to excuse a procedural default, Petitioner must show that, had counsel acted appropriately, it is more likely than not that no reasonable juror would have convicted him or that the constitutional violation resulted in conviction of someone who is actually innocent.); *see also Schlup v. Delo*, 513 U.S. 298 (1995). Moreover, an illegal arrest or detention does not void a subsequent conviction. *Gerstein v. Pagh*, 420 U.S. 103, 119 (1975). In this case, Petitioner's guilt was established beyond a reasonable doubt. Thus, Ground Three, appropriately decided on independent and adequate state grounds, is precluded from federal habeas review. *See Szuchon v. Lemon*, 273 F.3d 299.

C. Review of the Merits

1. AEDPA Standard of Review

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act[7] ("AEDPA"), which "altered the standard of review that a federal habeas court must apply to a state prisoner's claim that was adjudicated on the merits in state court." *Stevens v. Delaware Corr. Ctr.*, 295 F.3d 361, 368 (3d Cir. 2002) (*citing Williams v. Taylor*

[7] 28 U.S.C. § 2244 (2005).

529 U.S. 362, 402-13 (2000) (interpreting 28 U.S.C. § 2254(d)(1)). *See also Dunn v. Colleran*, 247 F.3d 450, 456-57 (3d Cir. 2001) (explaining *Williams*). More specifically, AEDPA "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Dunn*, 247 F.3d at 456-57 (*quoting Williams*, 529 U.S. at 399).

Pursuant to AEDPA, a federal habeas court may overturn state court's resolution of the merits of a constitutional issue only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Hackett v. Price*, 381 F.3d 281, 286 (3d Cir. 2004).

Under the "unreasonable application" clause, a federal court may grant the writ if the state court identifies the correct governing legal principle from Supreme Court decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* (*quoting Williams*, 529 U.S. at 412-13). The appropriate inquiry under the "unreasonable application of" standard is "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. An unreasonable application of federal law involves more than merely an incorrect or erroneous application of federal law: "[A] federal habeas court may not grant relief unless that court determines that a states court's incorrect application of

clearly established federal law was also unreasonable." *Id.* (*citing Williams*, 529 U.S. at 411).

The Supreme Court addressed the AEDPA's factual review provisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). There, the Supreme Court interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." *Id.* at 340. Yet, the habeas court can "disagree with a state court's credibility determination." *Id.*; *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d. Cir. 2004). *See also Wiggins v. Smith*, 539 U.S. 519 (2003) (rejecting state court's factual determination under § 2254(e)(1) and 2254(d)(2)). If the state court's decision based on a factual determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted under § 2254(d)(2). *Lambert*, 387 F.3d at 235.

2. *Ground One – Exclusion of an Exculpatory Tape-Recorded Conversation Claim*

Petitioner claims that the trial court abused its discretion by excluding an exculpatory piece of evidence - a tape-recorded conversation between Petitioner, Petitioner's father, and the complaining witness, Evan Tolson Pet. at 9; Pet. Br. at 2. The trial court ruled that the tape contained self-serving remarks spoken by Petitioner's father and was, therefore, inadmissible. Notes of Testimony ("N.T."), 05/30/02 at 4. Moreover, inasmuch as the Commonwealth and Petitioner had an opportunity to question Evan Tolson, in person, the need to play the tape recording for the jury was obviated. *Commonwealth v*

Washington, Nos. 4376-01, 4145-01, 4373-01 at 10 (Del. County Ct. Com. Pl., Dec. 26, 2002).

A federal habeas court will not generally decide the propriety of evidentiary rulings in a state criminal trial. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). Moreover, state evidentiary errors are not considered to be of constitutional proportion, are not cognizable in federal habeas corpus proceedings, unless the error "deprives a defendant of a fundamental fairness in his criminal trial." *Bisaccia v. Atty. Gen. of the State of NJ,* 623 F.2d 307, 323 (3d. Cir.), *cert. denied,* 449 U.S. 1042 (1980).

Upon a review of the record *in toto,* this Court cannot conclude that Petitioner was deprived of fundamental fairness at trial. Although Petitioner claims that the exclusion of this evidence prejudiced his defense, he fails to prove that this tape-recording would have been exculpatory. Petitioner sought to introduce the tape-recording for the purposes of impeachment the day after Mr. Tolson testified in court. N.T., 05/30/02 at 3-10. Nevertheless, both the Commonwealth and Petitioner had the opportunity to question Evan Tolson regarding the contents of the tape-recording as well as the circumstances under which it was made.[8] The trial court allowed the Commonwealth to

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[8] On cross-examination, Evan Tolson testified that he did not recall the recorded conversation:

Q. Mr. Tolson, do you remember having a conversation with Mr. Washington, Sr., [Petitioner's] father, and [Petitioner] outside of the store on June 4?

A. Nope.

Q. You don't remember that?

A. No I don't.

Q. You just said you did remember.

(Continued on following page)

call Evan Tolson back to the stand, rather than to play the tape-recording for the jury. N.T., 05/30/02 at 19-22. Upon recall, Evan Tolson, remembered having the tape-recording conversation, thus, effectively contradicting his earlier testimony denying any recollection of it. He even provided explicit details of the recording, before claiming that his statement on the tape was coerced. N.T., 05/29/02 at 193-96; 05/30/02 at 40-41. Thus, Petitioner had a full and fair opportunity to impeach this witness, in front of the jury, as to the excluded tape recording.

The Confrontation Clause does not secure the accused an unfettered right to confront a witness in any manner or with whatever evidence he may choose. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (*per curiam*). Rather, it secures the accused's *opportunity* to confront adverse witnesses through cross-examination, not the right to effective or successful cross-examination. *See id.* If Petitioner wanted to cross-examine the witness against him, he had the opportunity over two days of Evan Tolson's testimony. The trial court allowed Petitioner to examine Tolson regarding the details of the conversation, the time and place of its occurrence and the manner in which it was conducted. N.T., 46-50. If Petitioner had been allowed to play the tape to show that the witness lied, the evidence would merely have been cumulative. The jury heard Tolson's conflicting accounts, but, ultimately, found him more credible than Petitioner's alibi witnesses.

A. I said I didn't remember. I know he said something to me and said whatever, and I walked away. We haven't been sitting there and talking like yeah I am going to the barber shop, I am going to get my hair cut from your store, why would I say that'

N.T., 05/29/02 at 194-95.

It is noted that, even if a Sixth Amendment violation had occurred, this court would, nonetheless, affirm, since the state court's decision to exclude the recorded conversation was harmless. The other evidence against Petitioner – the victim's phone call to police to report his stolen car, the recovery of the victim's car outside of Petitioner's girlfriend's house, and the victim's testimony – adequately support his conviction. Under these circumstances, this Court concludes that exclusion of the tape-recording had no "substantial or injurious effect or influence in determining the jury's verdict." *California v. Roy*, 519 U.S. 2, 5 (1996) (*quoting Kotteakos v. United States*, 328 U.S. 750 (1946)). Therefore, the state court's determination was not contrary to nor an unreasonable application of federal law and Ground One is denied. *See* 28 U.S. [sic] § 2254(d)(1).

3. Ground Two – Addition of a Criminal Information the Day Before Trial Claim

Petitioner alleges that the trial court erroneously permitted the Commonwealth to file, at the last minute, a criminal information charging Petitioner with Robbery of a Motor Vehicle. Pet. at 10; Pet. Br. at 5. The Commonwealth submits that the trial court acted within its discretion in allowing the amendment. Ans. at 14. Under Pennsylvania Rules of Criminal Procedure:

> The court may allow an information to be amended where there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information as amended does not charge an additional or different offense. Upon amendment, the court may grant

> such postponement of trial or other relief as is necessary in the interests of justice.

Pa.R.Crim.P. 564 (*formerly* Pa.R.Crim.P. 229).

The day before the trial involving Petitioner's incident with Evan Tolson, the Commonwealth filed a criminal information charging him with Robbery of a Motor Vehicle;[9] the original information charged Robbery.[10] The state court permitted the amendment because:

> [Petitioner] was fully apprised of the facts underlying the criminal charges filed against him and the amendment did not in any way hinder his

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[9] 18 Pa.C.S.A. 3702. Robbery of a Motor Vehicle

(a) Offense defined. A person commits a felony in the first degree if h steals or takes a motor vehicle from another person in the presence o that person or any other person in lawful possession of the moto vehicle.

[10] 18 Pa.C.S.A. 3701. Robbery

(a) Offense defined.

(1) A person is guilty of robbery if, in the course of committing theft, he:

(i) inflicts serious bodily injury upon another;

(ii) threatens another with or intentionally puts him i fear of immediate serious bodily injury;

(iii) commits or threaten immediately to commit any felon of the first or second degree;

(iv) inflicts bodily injury upon another or threatens ar other with or intentionally puts him in fear of immediat bodily injury; or

(v) physically takes or removes property form [sic] the pe son of another by force however slight.

> ability to adequately prepare a defense, nor did it result in any prejudice.[11]

Commonwealth v. Washington, Nos. 4376-01, 4145-01, 4373-01 at 9.

It is deep-rooted in the United States Supreme Court's jurisprudence that a defendant has a fundamental right to be informed of the nature of the charge against him. *See generally, United States v. Hess*, 124 U.S. 483, 487 (1888) ("Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged"). It is sufficient that the information sets forth, without uncertainty, each element necessary to constitute the offense. *United States v. Carll*, 105 U.S. 611, 612 (1882); *see also Hanging v. United States*, 418 U.S. 87, 117 (1974) (discussing sufficiency of an indictment.)[12]

In the case *sub judice,* the original information against Petitioner charged Robbery and Unauthorized Use of a Motor Vehicle. *Commonwealth v. Washington,* Nos. 2612, 2613, and 2614 at 4. Through this information, the Commonwealth informed Petitioner of the general offense with which he would be charged and the factual basis for

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[11] The Commonwealth amended the information the day before trial, so this issue does not implicate concerns of double jeopardy. *Crist v. Bretz*, 437 U.S. 28, 38 (1978) (holding that double jeopardy attaches when the jury is empaneled and sworn).

[12] The Supreme Court cases cited herein discuss the sufficiency of indictments, subject to higher due process requirements than the criminal information. To the extent that Petitioner's information meets this higher threshold, the difference is irrelevant.

the charges. Thereby, Petitioner was notified that the Commonwealth was charging him with theft as a result of the events that transpired with Evan Tolson. Regardless of whether the Commonwealth pursued charges of robbery and of unauthorized use of a motor vehicle or robbery and robbery of a motor vehicle, Petitioner still faced the task of establishing either that he did not take the car or that he took the car with permission. The Commonwealth's original information sufficiently appraised Petitioner of the elements necessary to constitute the offense, regardless of the pre-trial amendment. Therefore, the state court's decision to allow the amendment was neither contrary to nor involved an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

Additionally, Ground Two should be denied, because Petitioner cannot establish that any prejudice arose from the addition of the criminal information the day before his trial. At trial, Petitioner presented two alibi witnesses: his mother, Ms. Hamm and his father, William Washington Sr. N.T., 05/30/02. Both witnesses testified that Petitioner was at his mother' hair salon from before 6:00 and 8:00 p.m. when Ms. Hamm, Mr. Washington Sr., and Petitioner left together. N.T., 05/30/02 at 69-70, 79-80. Petitioner' defense strategy at trial was not to disprove an element of the crime or dispute the presence of the requisite *men rea*. Rather, Petitioner sought to convince the jury that he was elsewhere and, hence, could not have stolen the car. The elements of the crime charged were of little consequence given the nature of Petitioner's defense. The jury' rejection of Petitioner's alibi defense was not the result of the amended information.

Because Petitioner cannot show that the amendment to the information prejudiced his defense, he has failed t

establish that the trial court's decision to allow the amendment the day before deprived him "of a fundamental fairness in his criminal trial." *Bisaccia*, 623 F.2d at 323. Federal habeas relief is, thus, unwarranted on Ground Two.

III. CONCLUSION

Petitioner's search and seizure claim is procedurally defaulted; his evidentiary and late bill of information claims fail to demonstrate a Constitutional violation. Therefore, this habeas corpus Petition should be denied in its entirety. Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 29th day of July, 2005, for the reasons contained in the preceding report, it is hereby RECOMMENDED that Petitioner's three claims, inasmuch as they are devoid of merit or procedurally defaulted, should be DENIED with prejudice and without an evidentiary hearing. Petitioner has not shown that any reasonable jurist could find it debatable that this petition is procedurally barred or that he is entitled to relief. Therefore, there is no probable cause to issue a certificate of appealability.

/s/ Carol S. M. Wells
CAROL SANDRA MOORE WELLS
United States Magistrate Judge

LAW OFFICES OF WILLIAM C. REIL
BY: William C. Reil, Esquire
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(215) 564-1635 ATTORNEY FOR PETITIONER

WILLIAM E. WASHINGTON PP# 8414 1100 Pike Street Huntingdon, PA 16654	: UNITED STATES : DISTRICT COURT FOR : THE EASTERN DISTRICT : OF PENNSYLVANIA
vs.	:
SUPERINTENDENT JAMES GRACE 1120 Pike Street Huntingdon, PA 16654	: NO: : HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

William E. Washington, through his undersigne counsel, requests the Court to issue a Writ of Habea Corpus, with respect to his incarceration, and in suppor thereof it is averred as follows:

1. Petitioner is William E. Washington, PP#841 who is currently incarcerated at the State Co rectional Institution in Huntingdon, PA.

2. Respondent James Grace is the Superintende for the State Correctional Institution at Hur tingdon, PA, with the address as indicated in th caption.

3. The Petitioner was tried before the Honorabl Joseph P. Cronin, Jr., of the Court of Commo Pleas of Delaware County, in three separate jur

verdicts commencing on 5/1/02 (two consolidated incidents), 5/2/02 and 5/29/02.

4. Mr. Washington was charged arising out of four separate criminal incidents, which occurred in Yeadon, PA between 5/30/01 and 8/4/01, and he was convicted of robbery, criminal restraint, terroristic threat and related offenses.

5. On 6/26/02, Judge Cronin sentenced Mr. Washington to the following: an aggregate term of confinement of not less than nine (9) months, nor more than eighteen (18) months on No. 4373-01 for Criminal Attempt and Unlawful Restraint; an aggregate term of confinement of not less than nine (9) months, nor more than eighteen (18) months on No. 4376-01 for Terroristic Threats; an aggregate term of confinement of not less than fifty-four (54) months, nor more than one hundred eight (108) months on No. 4145-01 for Robbery and Robbery of a Motor Vehicle.

6. Petitioner appealed to the Superior Court of Pennsylvania, which denied his consolidated appeals on 1/14/04 from the three jury verdicts.

7. Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on 7/13/04.

8. William E. Washington was incarcerated in violation of law, and subjected to cruel and unusual punishment, since after his arrest he was held incommunicado for a period of 13 days and in solitary confinement for a period of 23 days.

9. The Petitioner's Constitutional rights have been violated for the following reasons:

   (a) he has been incarcerated without due process and in violation of the Constitution of the

United States, since the trial Court did no allow defense counsel to play a tape recordin between Mr. Washington, the complainan and his father, which was exculpatory;

(b) he was incarcerated without due proces and in violation of the Constitution of th United States, because the arrest an search warrants executed against Mr. Wash ington were invalid, since they were nc signed by the issuing authority and ther was no expiration date;

(c) the trial Court allowed the amendment c criminal charges one day before the tria and different charges were alleged.

WHEREFORE, the Court is requested to grant a immediate hearing on the request of Mr. Washington for Writ of Habeas Corpus terminating his incarceration, or i the alternative, granting him a new trial.

Respectfully Submitted,

/s/ Will C. Reil
WILLIAM C. REIL, ESQUIRE
Attorney for Petitioner
10/13/04

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4378

WILLIAM E. WASHINGTON,
Appellant

v.

JAMES GRACE, SUPERINTENDENT;
THE DISTRICT ATTORNEY OF THE COUNTY
OF DELAWARE COUNTY; THE ATTORNEY GENERAL
OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 04-cv-04812
District Judge: The Honorable J. Curtis Joyner

Present: SCIRICA, *Chief Judge,* SLOVITER, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, VAN ANTWERPEN, and NYGAARD,* *Circuit Judges*

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in

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* Limited to panel rehearing only.

the decision of this Court, and to all the other availabl circuit judges in active service, and a majority of th circuit judges of the circuit in regular active service nc having voted for rehearing by the court *en banc*, th petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: **February 3, 2006**
CMC/cc: William C. Real, Esq.
Louis G. Stesis, Esq.

Commonwealth of Pennsylvania	APPLICATION FOR SEARCH WARRANT AND AUTHORIZATION
[LOGO]	
COUNTY OF Delaware	
Docket Number (Issuing Authority): CR-112-01	Police Incident Number: 20010806M0050
	Warrant Control Number: 0183290

Det Sgt David M. Splain	Yeadon Police Department	610-623-1500	08/12/2001
AFFIANT NAME	AGENCY	PHONE NUMBER	DATE OF APPLICATION

IDENTIFY ITEMS TO BE SEARCHED FOR AND SEIZED *(Be as specific as possible)*:
Any and all firearms, a pack of Newport cigarettes, electronic pager, a red baseball cap, red jersey with the #27 on the front, blue jeans, black wrist watch, gray sweat shirt, gray sweat pants, a black and red #3 Philadelphia 76ers jersey and a SEPTA Transpass.

SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSON TO BE SEARCHED *(Street and No., Apt. No., Vehicle, Sale Deposit Box, etc.)*:
1059 Serrill Avenue Yeadon, PA 19050, Two story twin home, brick front.

NAME OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED *(If proper name is unknown, give alias and/or description)*:
William F. Washington & William Echelon Washington

VIOLATION OF *(Describe product or specify statute)*:	DATE(S) OF VIOLATION:
901(3702), 901(2902), 901(2901), 2701, 2705, 2706, 907, 908 & 6106	7/28,8/4,8/7/2001

☐ *Warrant Application Approved by District Attorney - DA File No. ___*
(If DA approval required per Pa.R.Crim.P. 2002A with assigned File No. per Pa.R.Crim.P. 107)

☐ *Additional Pages Attached (Other than Affidavit of Probable Cause)*

☒ *Probable Cause Affidavit(s) MUST be attached (unless sealed below) Total number of pages:* 3

TOTAL NUMBER OF PAGES IS SUM OF ALL APPLICATION PROBABLE CAUSE AND CONTINUATION PAGES EVEN IF ANY OF THE PAGES ARE SEALED

The below named Affiant, being duly sworn (or affirmed before the issuing Authority according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure and is located at the particular premises or in the possession of the particular person as described above.

/s/ [Illegible]	Yeadon Police Department	4651
Signature of Affiant	*Agency or Address if private Affiant*	*Badge Number*

Sworn to and subscribed before me this 12th day of Aug 01 ~~19~~ ___. Mag. Dist. No. 32-2-40

/s/ [Illegible]	21 Bartram Ave. Glenolden, Pa.	*(SEAL)*
Signature of Issuing Authority	*Office Address*	

SEARCH WARRANT TO LAW ENFORCEMENT OFFICER:

WHEREAS, facts have been sworn to or affirmed before me by written affidavit(s) attached hereto from which I have found probable cause, I do authorize you to search the premises or person described, and to seize, secure, inventor and make return according to the Pennsylvania Rules of Criminal Procedure.

☑ This Warrant shall be served as soon as practicable and shall be served only between the hours of 6AM to 10PM but in no event later than:*

☐ This Warrant shall be served as soon as practicable and may be served any time during the day or night but in no event later than:**
_____ M. o'clock _____ 19___.

* The issuing authority should specify a date not later than two (2) days after issuance. Pa.R.Crim.P. 2005(d).

** If the issuing authority finds reasonable cause for issuing a nighttime warrant on the basis of additional reasonable cause set forth in the accompanying affidavit(s) and wishes to issue a nighttime warrant, then this block shall be checked. Pa.R.Crim.P. 2005(g).

Issued under my hand this 12th day of Aug 01 ~~19~~ ___ at 10:00 A M. o'clock.

/s/ [Illegible]	32-2-40	2014 *(SEAL)*
Signature of Issuing Authority	*Mag. Dist. or Judicial Dist. No.*	*Date Commission Expires:*

Title of Issuing Authority:
☑ District Justice ☐ Common Pleas Judge ☐ ___

☐ *For good cause stated in the affidavits(s) the Search Warrant Affidavit(s) are sealed for ___ days by my certification and signature. (Pa.R.Crim.P. 2011)*

_____ _____(Date) *(SEAL)*
Signature of Issuing Authority (Judge of the Court of Common Pleas or Appellate Court Justice or Judge).

TO BE COMPLETED BY THE ISSUING AUTHORITY